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Supreme Court, U.S.
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No. 97-799

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

KIMBERLY B. ELLERTH,
Cross-Petitioner,

v.

BURLINGTON INDUSTRIES, INC.,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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APP

CROSS-RESPONDENT'S BRIEF IN OPPOSTION

Cross-respondent Burlington Industries, Inc. respectfully requests that the petition of cross-petitioner, Kimberly B. Ellerth for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit be denied.

STATEMENT OF THE CASE

Cross-respondent, Burlington Industries, Inc. ("Burlington"), adopts and incorporates herein the Statement of the Case presented in its Petition for a Writ of Certiorari in the instant cause (No. 97-569).

REASONS FOR DENYING THE WRIT

I. ELLERTH'S CROSS-PETITION HAS BEEN PREEMPTED BY *FARAGHER*

Both of the questions which Ellerth argues that this Court should grant certiorari in order to consider, 1) the proper standard of employer liability in "hostile work environment" sexual harassment cases arising under Title VII of the Civil Rights Act of 1964 and 2) the proper source of agency principles to be used in determining employer liability in such cases, have been preempted by this Court's grant of a writ of certiorari in *Faragher v. City of Boca Raton* (No. 97-282). Because this Court will address these exact issues in deciding *Faragher*, granting Ellerth's cross-petition for certiorari would be duplicative and unnecessary.

II. ELLERTH WAIVED HER NEGLIGENCE CLAIMS IN THE COURT OF APPEALS

Although Ellerth argues in part that a "heightened" negligence standard should govern employer liability in hostile work environment sexual harassment cases, she expressly waived her negligence claims in her briefs submitted to the Court of Appeals below. (App.[1] 6a, 28a) Contrary to Ellerth's statement that only "some of the judges in the *en banc* panel" believed that she had waived her negligence argument, the *per curiam* portion of the panel's opinion states that eight of the eleven judges on the panel concurred in this view. (App. 6a) Thus, to the extent that Ellerth argues that this Court should apply a negligence standard with a heightened duty of care to hostile work envrionment claims, her cross-petition fails to raise an actual claim or controversy and should be denied.

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[1] In this brief, "App." shall refer to the Appendix to Burlington's Petition for Certiorari.

CONCLUSION

The Cross-Respondent respectfully requests that this Court deny the cross-petition for a writ of certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals for the reasons stated above.

Respectfully submitted,

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